RECENT DECISIONS.

ADMIRALTY — DEMURRAGE — CONSTRUCTION OF CHARTER PARTY. The claimants chartered the steamer "Roath" to carry coal to Boston, the charterers not to be liable for delay in discharging due to causes or accidents beyond their control. The vessel was delayed by the congested condition of the docks. *Held*, the claimants were liable. *New Ruperra S. S. Co.* v. *2000 Tons of Coal* (D. C., D. Mass. 1903) 124 Fed. 937.

The case is decided on the authority of *Davis* v. *Wallace* (1868) 3 Cliff. 123, where demurrage was to be due if delay happened by the default of the charterers. Default is there interpreted as failure on the part of the charterers to perform their contract. There would seem to be a valid distinction between delay caused by the charterers' default and delay caused by occurrences beyond the charterers' control. The principal case is however supported by *Williams* v. *Theobald* (1883) 15 Fed. 465 and, indirectly, by *1600 Tons of Nitrate of Soda* v. *McLeod* (1894) 61 Fed. 849 and *Sorensen* v. *Keyser* (1892) 52 Fed. 163, the latter case holding that exceptions to the charterers' liability are to be very strictly construed.

BANKRUPTCY—EFFECT OF DISCHARGE ON JUDGMENT FOR SLANDER. A judgment was recovered against the appellant in an action for slander, prior to his discharge in bankruptcy. The Bankruptcy Act excepts from a discharge in bankruptcy "judgments in actions for . . . willful and malicious injuries to the person or property of another." 30 U. S. Stat. at Large, 550. *Held*, the judgment in slander was for an injury to the person and being within the exception quoted was not discharged. *Sanderson* v. *Hunt* (Ky. 1903) 76 S. W. 179.

This construction of the statute appears reasonable and is upheld by analogous cases. The policy of the Bankruptcy Act is to relieve the honest, insolvent debtor from contract liabilities and not to free him from the consequences of his wrongdoing. In construing the clause in question judgments in actions for libel, *McDonald* v. *Brown* (1902) 23 R. I. 546, criminal conversation, *Colwell* v. *Tinker* (1902) 169 N. Y. 531 and seduction, in re *Freche* (1901) 109 Fed. 620, have been held to be for malicious and willful injuries to the person of the plaintiff and within the meaning of the exception. In the last cited case the court says that the injury is analogous to a case of slander or libel. By the amendment of 1903, 32 U. S. Stat. at Large 798, judgments in actions for seduction and criminal conversation were specifically added to the original list of debts not discharged. This specific designation may possibly raise a question in construing the amended section as to whether judgments for slander and libel are not by implication excluded from its operation.

CARRIERS—DUTY TO PROTECT PASSENGERS. The plaintiff, a passenger, while alighting from defendant's train, was shot by C, who was engaged in a shooting affray with defendant's servant, L. The conductor and baggage-master were standing on the car-platform, watching the affray, as plaintiff alighted. *Held*, their failure to warn plaintiff of his danger was negligence for which defendant was liable. *Penny* v. *Atlantic Coast Line R. R. Co.* (N. C. 1903) 45 S. E. 563.

The carrier's duty to protect the passenger is a part of the contract to carry safely, and continues until the relation of carrier and passenger is terminated. The duty to protect was therefore properly extended to cover the passenger's safe exit from the train. Although in some of the cases it is said that the carrier, in protecting the passenger, must use the "utmost vigilance and care," or a "high degree of care," the rule generally adopted is that whenever the carrier knows or has opportunity

to know of a threatened injury to the passenger, or might reasonably have anticipated the happening of an injury, and fails to use proper means to prevent it, the carrier is liable. *Connell* v. *Chesapeake R. R. Co.* (1896) 93 Va. 44; *Murphy* v. *Western R. R.* (1885) 23 Fed. 637; *Pittsburg R. R. Co.* v. *Hinds* (1866) 53 Pa. St. 512. The principal case is clearly within this rule.

CONSTITUTIONAL LAW—CRIMINAL CONTEMPT OF COURT—POWER OF LEGISLATURE TO DEFINE. Defendant attacked the honesty of the Supreme Court in a newspaper article. This was not among the exclusive list of criminal contempts laid down by the legislature. *Held*, the legislature has no authority to define criminal contempts as that is an invasion of the judicial prerogative guaranteed by the Constitution. *State* ex inf. *Crow* v. *Shepherd* (Mo. 1903) 76 S. W. 79. See NOTES, p. 65.

CONSTITUTIONAL LAW—EMINENT DOMAIN—MEASURE OF DAMAGES. In condemnation proceedings instituted by a railroad company to acquire a portion of the defendant's land, *held*, he was entitled not only to the market value of the part taken and to any damages to the residue resulting from the severance, but also to damages resulting from the use to which the property was to be put by the company. *So. Buffalo Ry. Co.* v. *Kirkover* (1903), 176 N. Y. 301.

A conflict in the holdings in the New York Supreme Court is settled by the decision, and a broad construction is put on the constitutional inhibition against taking private property. The precise question is new in the Court of Appeals. This rule of damages had been laid down in dicta in *Newman* v. *Met. El. Ry.* (1890) 118 N. Y. 618, and *Bohm* v. *Met. El. Ry.* (1892) 129 N. Y. 576, and the court seems to be influenced by those cases, though it recognizes the present case as an extension. The decision seems to be in line with the definition of "property" contended for by Mr. Sedgwick in his work on Damages, 8th Ed. § 1117, discussed in 3 COLUMBIA LAW REVIEW 112. In allowing for the use to be made of the land because damage will be done to the residue and its appurtenances the court would seem to have in mind some such broad conception of what is property. If this is the position taken, it would seem to be inconsistent with *Benner* v. *Atlantic Dredging Co.* (1892) 134 N. Y. 156.

CONTRACTS—ASSIGNMENT OF OBLIGATIONS—INFERENCE OF INTENTION FROM CIRCUMSTANCES. The receivers of a railroad contracted with a construction company for whose faithful performance the defendants gave a guaranty bond. The railroad was sold to the plaintiffs to whom the contract and bond were assigned. Subsequently the contractor abandoned the work. *Held*, the principal contract was assignable, though apparently the promisee's credit was involved, and the rights under the bond passed incidentally. *American B. & T. Co.* v. *B. & O. S. W. R. Co.* (C. C. A., 6th C., 1903) 124 Fed. 866.

The court lays down the rule that contract obligations are non-assignable only when there is evidence that the parties so intend. The better view is that in general contract liabilities may not be assigned. *Ark. Smelting Co.* v. *Belden* (1888) 127 U. S. 379; Pollock on Contracts, 4th Ed., 424, 425. There is an exception, however, where there clearly appears a contrary intention, either expressed in the contract, *M. M. & C. R. Co.* v. *Bacon* (1876), 33 Mich. 466, or readily inferable from the nature of the contract or the circumstances of the case. *Devlin* v. *Mayor* (1875) 63 N. Y. 8; *Galey* v. *Mellon* (1896) 172 Pa. St. 443. As the court found that in fact such an intention might be inferred in the principal case, there was no need of invoking the anomalous principle announced in the opinion. See *Tolhurst* v. *Cement M'f'rs* [1903] A. C. 414.

CONTRACTS—ANTICIPATORY BREACH. The plaintiff brought an action for breach of a contract upon the renunciation of it by the defendant before the time for performance had arrived. *Held*, a mere renunciation

does not create a breach; there must be an adoption of the renunciation by the other party which in effect evidences his intention to treat the contract as at an end. *Wells* v. *Hartford Manilla Co.* (Conn. 1903) 55 Atl. 599. See NOTES, p. 64.

CONTRACTS—LIQUIDATED DAMAGES DETERMINED BY INTENT OF PARTIES. The defendants received, at their own risk, chattels belonging to the plaintiff, at an alleged agreed valuation. On suit for breach of the contract to return, evidence of the defendant tending to show a different value was rejected. *Held*, the question as between liquidated damages and penalty is one of intent, and evidence of the unreasonableness of the stipulated sum was material as determining the intent of the parties. *Hicks* v. *Monarch Cycle Mfg. Co.* (1903) 176 N. Y. 111.

Assuming the intention of the parties as the criterion, such evidence would indicate what their intention was, and such intent having been established judgment must be given for the stipulated amount. Accordingly where the intention is unmistakably expressed, evidence of actual damage is immaterial. *Sun Print. & Pub. Ass'n.* v. *Moore* (1902) 183 U. S. 642. But in most jurisdictions the courts decline to recognize the intention of the parties as controlling; "rules of language are ignored and the expressed intent of the parties is made to give way to the equity of the particular case." *Seaman* v. *Biemann* (1900) 108 Wis. 365; *Scofield* v. *Tompkins* (1880) 95 Ill. 190; *Condon* v. *Kemper* (1891) 47 Kan. 126; 3 COLUMBIA LAW REVIEW, 588.

CORPORATIONS—COMPLIANCE WITH TAX LAW AS A CONDITION PRECEDENT TO RIGHT OF FOREIGN CORPORATION TO SUE. In a suit by a foreign corporation the defence was that the plaintiff had not complied with the law requiring the payment of a license fee within a specified time after beginning business as a condition precedent to the right of such corporation, authorized to do business, to sue in the State courts. Plaintiff had been transacting business in the State for several years without authority. Prior to bringing suit, but, as alleged, after the time limited for paying the license fee, it complied with the general corporation law, paid the fee and received a certificate and a receipt. *Held*, the action could be maintained. *Dunbarton Flax Spinning Co.* v. *G. & J. R. Co.* (N. Y. 1903) 87 App. Div. 21.

Although the provisions of the license tax law shutting the courts of the State to foreign corporations for non-compliance is evidently directed at the transaction of any corporation business within the State, the stating part of the enactment refers only to corporations authorized to do business under the general corporation law, Laws 1896, c. 908, p. 858, am'd. Laws 1901, c. 558, p. 1364, and the court is clearly correct in the construction that the penalty should be enforced only against a corporation transacting an authorized business. That the plaintiff was doing business without right was purely a matter between it and the people of the State, remediable under section 1948, subd. 4, Code of Civ. Proc.

CORPORATIONS—CONSOLIDATION—JURISDICTION OF FEDERAL COURTS. In an action of tort for injuries sustained in Massachusetts, brought by a citizen of that State in the United States Circuit Court there against the defendant as a company incorporated in Connecticut, the defendant pleaded to the jurisdiction on the ground that it was also a Massachusetts corporation. *Held*, the railroad was "one corporation with several aspects treated in each corporating State as a citizen of that State alone," and would therefore be regarded as a Massachusetts corporation in Massachusetts, and the plea would be sustained. *Goodwin* v. *N. Y., N. H. & H. R. R. Co.* (C. C., D. Mass. 1903) 124 Fed. 308. See NOTES, p. 63.

CORPORATIONS—RIGHT TO ENJOIN INJURY TO MEMBERS. The plaintiff, a corporation composed of employers, sought to enjoin striking employes of its members from interfering with its own property or that of its

members and from intimidating their workmen. No injury to tangible corporate property was shown. *Held*, the injunction must be granted. *Horseshoers' Association* v. *Quinlivan* (N. Y. 1903) 83 App. Div. 459. See NOTES, p. 59.

CRIMINAL LAW—DUTY OF SOLDIER—HOMICIDE. In order to suppress rioting the Governor of Pennsylvania ordered out the militia. Defendant, a private, was placed on guard at a house which there was reason to believe would be dynamited, with orders "to shoot and shoot to kill" anyone who refused to halt after being fairly challenged. *Held*, a state of qualified martial law was created by the order of the Governor, and a subordinate who committed a homicide in obeying the lawful command of his superior was excused, where the act was done in good faith and without malice. *Commonwealth* v. *Shortall* (Pa. 1903) 55 Atl. 952.

Although it has been held that "martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction," ex parte *Milligan* (1866) 4 Wall. 2, a contrary view has been entertained as to the correctness of this test. In re *D. F. Marais*. L. R. (1902) A. C. 109; 15 *Har. Law Review* 850. The difference in opinion is partly due, doubtless, to the fact that the term "martial law" is used in several senses. Less settled, perhaps, than is the meaning of this term, is the question how far a subordinate will be protected when acting under orders from his superior. His position seems similar to that of an officer executing a civil process. The better view seems to be that he will be protected where the order came from one whom he was bound to obey and was such that he might reasonably believe his superior had a right to issue. Pollock on Torts, p. 80; 1 Stephen, History of the Crim. Law of England, 205–206. See also 17 *Law Quarterly Review* 87.

EQUITY—INJUNCTION—TRESPASS. In a suit in equity to restrain trespass on real estate, *held*, equity would not issue an injunction where the defendants were in possession under color of title and no irreparable damage was threatened. *Munyos* v. *Fillmore* (Ind. Ter. 1903) 76 S. W. 257.

The case is in line with authority and clearly sound. *Eskridge* v. *Eskridge* (1875) 51 Miss. 522; *C. & O. Canal Co.* v. *Young* (1853) 3 Md. 480. Where the damage threatened is irreparable, however, equity will not allow a mere denial of title to deprive the plaintiff of all equitable aid, but will examine the plaintiff's claim, and if plausible will grant an injunction pending legal proceedings, even though the defendant is in possession. *Ehrardt* v. *Boaro* (1884) 113 U. S. 537; *Lowndes* v. *Bettle* (1864) 33 L. J. Ch. 451; *U. S.* v. *Parrot* (1858) 27 Fed. Cas. 416. But where no irreparable damage is threatened, it seems to be a usurpation of legal functions for equity to determine a title, involving a disputed dedication, and thereupon grant an injunction, as in *Ga. Ry. & Banking Co.* v. *City of Atlanta* (Ga. 1903) 45 S. E. 256. Where, however, the legal and equitable jurisdictions have been combined, the whole matter may be determined in a single action. *Hinckel* v. *Stevens* (N. Y. 1897) 17 App. Div. 279.

EQUITY—JURISDICTION TO RESTRAIN CRIMINAL PROCEEDINGS. Asserting that the plaintiff had dedicated certain land to the public, the city authorities threatened to tear down any fence erected thereon and, under an ordinance, to prosecute the plaintiff or any of its agents who obstructed the streets. The plaintiff asked for an injunction restraining the threatened trespasses and the criminal prosecution. *Held*, the injunction should be granted. *Georgia R. & B. Co.* v. *City of Atlanta* (Ga., 1903) 45 S. E., 256.

Equity may properly enjoin a criminal prosecution where irreparable injury to property is threatened unless a question of fact involving the guilt or innocence of a party is presented. 2 COLUMBIA LAW REVIEW 550. In the principal case there was no controversy as to the facts but it is difficult to see how the court could enjoin the criminal suit on the

ground of irreparable injury to property, since such prosecution, to which the plaintiff would have had an adequate defence, could neither directly nor indirectly affect the property. As to the propriety of enjoining the threatened trespass see the discussion of the preceding case.

EQUITY—RESTRICTIVE COVENANT—WAIVER BY ACQUIESCENCE. Plaintiff laid out a tract of land as a seaside resort of a religious character. Each deed of a lot contained a covenant against desecration of the Sabbath by carrying on any trade or business. Defendant, a druggist, sold soda and medicines on Sunday. The evidence showed that bath-houses had been open on Sunday for a number of years, meat and ice-cream were delivered, cigar and fruit stores did business and hacks and cars ran without objection. *Held*, the plaintiff, by acquiescence, had waived its right to equitable assistance. *Ocean City Ass'n* v. *Chalfant* (N. J. 1903) 55 Atl. 801.

Restrictive covenants as to the use of real property are jealously guarded in Chancery so long as there is a benefit to the plaintiff, and acquiescence in violations similar to that complained of in the principal case, but not injurious to the plaintiff, will not constitute a waiver. *Payson* v. *Burnham* (1886) 141 Mass. 547. But if the object of the covenant cannot be attained, by reason of permanent alterations or change in the character of the neighborhood, equitable relief will be refused. *Roth* v. *Jung* (N. Y. 1903) 79 App. Div. 1. Specific countenance of the breach or participation in the act, as being a customer, will defeat the right of the covenantee, *Sayers* v. *Collyer*, (1884) L. R. 28 Ch. Div. 103, and acquiescence in repeated violations over a long period of time is a good defence by a person acting upon the assumption that the restrictions are no longer to be observed. *Moore* v. *Murphy* (1895) 89 Hun 175. Each case must stand alone, the question being largely one of fact and degree.

EQUITY—SPECIFIC PERFORMANCE OF CONTRACT PARTLY EXECUTED. The complainant was vendee of a stock of general merchandise for which he had paid the defendant a lump sum of $20,000. Defendant after delivering about two-thirds of the goods concealed the remainder so that they could not be replevied. *Held*, equity had jurisdiction to compel completion of the contract since it had been performed in part regardless of any question of adequacy of legal damages. *Raymond Syndicate* v. *Brown* (1903) 124 Fed. 80. See NOTES, p. 61.

EVIDENCE—MEASURE OF DAMAGES FOR BREACH OF COVENANT OF SEISIN. The defendant conveyed land to the plaintiff with a covenant of seisin. He had previously conveyed the coal and minerals under the surface to a third person. In an action on the covenant defendant pleaded that at the time of the execution of the deed to the plaintiff the latter knew of the previous conveyance of the coal to another and therefore had paid consideration only for the surface, Plaintiff demurred. *Held*, the evidence was admissible not to contradict the covenant of seisin but in mitigation of damages. *Lloyd* v. *Sandusky* (Ill. 1903) 68 N. E. 154. See NOTES, p. 57.

EVIDENCE—CONSTITUTIONAL LAW—SEARCH WARRANT. In two criminal actions the state offered in evidence articles tending to connect the defendant with the crime, taken from his house under a search warrant. The defendant objected (1) that to admit such evidence would violate the constitutional provision that no person shall be compelled to furnish evidence, or be a witness, against himself in a criminal case, and (2) that the search warrant was illegal, and that the admission of the evidence would violate the constitutional guaranty against unreasonable searches and seizures. *Held*, the evidence was inadmissible. *State* v. *Sheridan* (Iowa 1903) 96 N. W, 730. *Held*, the evidence was admissible. *People* v. *Adams* (1903) 176 N. Y. 351. See NOTES, p. 60.

INSURANCE—MUTUAL BENEFIT ASSOCIATIONS—UNREASONABLE BY-LAWS. The by-laws of a mutual benefit association provided that no action at law should be brought by an aggrieved member until he had exhausted all his remedies by appeals to tribunals within the order. *Held*, where the proper tribunal will not meet for almost a year, and then at a great distance away, and it appears that no relief would result from such appeals, such by-laws are no bar to an action in the courts. *Brown* v. *Supreme Court I. O. F.* (N. Y., 1903), 68 N. E. 145.

The by-laws are considered terms of the contract, and that the cost or inconvenience is great should not be a sufficient reason for excusing the plaintiff. The lodge has contracted for the privilege of hearing appeals from the decisions of its officers, and it should have this privilege however the court believes the decision would result. The holding is unsound in principle, extends unnecessarily the anomalous doctrine by which the courts refuse to give effect to contracts providing for arbitration, and is opposed to the weight of authority. *D. & H. Canal Co.* v. *Pa. Coal Co.* (1872) 50 N. Y. 250; *Levy* v. *Order of the Iron Hall* (1892) 67 N. H. 593; *Oliver* v. *Hopkins* (1887) 144 Mass. 175.

INSURANCE—WAIVER AND ESTOPPEL. An application for insurance against losses on sales of merchandise, which was made part of the policy, contained an untrue statement of gross sales and losses for the past five years. *Held*, as the insurance agent informed plaintiff that what was required was a statement of sales and losses on sales to customers having a commercial rating only, which was truly given, the company was estopped from setting up the untruth of the statement as a defense. *Carrollton Furniture Mfg. Co.* v. *American Credit Ins. Co.* (C. C. A., 2nd Civ. 1903) 124 Fed. 25.

The socalled doctrine of waiver and estoppel, here applied, is a flagrant anomaly. No true waiver can be found, and estoppel is carried beyond its legitimate sphere when it is invoked to sanction a violation of the parol evidence rule for the purpose of holding the defendant to the modified agreement. Nor would a reformation of the contract by a court of equity accomplish the same result for the defendant never agreed to take the risk for which he is held liable. In a case which the present decision makes a lame effort to distinguish the United States Supreme Court, after extended comment on the nature and prevalence of the doctrine, concluded that it clearly violated the parol evidence rule to which contracts of insurance are as much subject as any other class of contracts and refused a recovery. *Assurance Co.* v. *Building Ass'n* (1901) 183 U. S. 308.

MASTER AND SERVANT—LIABILITY AS JOINT TORT FEASORS—EXEMPLARY DAMAGES. A railroad corporation was charged with the reckless, wilfull and malicious conduct of its servants in the course of their employment and was joined with them as co-defendant. *Held*, there were two controversies justifying a removal of the cause as to the foreign corporation to a Federal court. *Davenport* v. *Southern R. Co.* (C. C., D. S. C. 1903) 124 Fed. 983.

The position of the court is that where the act is not expressly authorized the liability imposed by law upon the corporation principal differs from the personal liability of the individuals so that they cannot be jointly held, and secondly a corporation is not answerable in punitive damages while its servants may be. Upon both these points there is considerable conflict of authority, although the rule in the Federal courts upon both points is as laid down above. *Warax* v. *Railway Co.* (1896) 72 Fed. 637; *Lake Shore etc. R. Co.* v. *Prentice* (1893) 147 U. S. 101. Some jurisdictions broadly deny the master's liability in punitive damages where he did not in fact take part in the wrong. *Cleghorn* v. *N. Y. C. & H. R. R.* (1874) 56 N. Y. 44, while others make an exception in the case of corporations. *Atlantic etc. R. Co.* v. *Dunn* (1871) 19 Ohio St. 362. On the question whether principal and agent may be proceeded against as joint tort feasors there is a similar disagreement, though the weight of authority is in favor of their joinder. Huffcut on Agency, 2nd ed., § 214.

MUNICIPAL CORPORATIONS — LIABILITY IN QUASI CONTRACT. A school township trustee, without complying with the formalities required by law, purchased for the township certain school supplies. *Held*, there could be no recovery in quantum meruit where the goods were tangible and could be recovered in specie. *Union Nat. Bank* v. *Franklin School Tp.* (Ind. 1903) 68 N. E. 328. See NOTES, p. 67.

PLEADING AND PRACTICE—CONTEMPTS—MANDAMUS OF INFERIOR COURT. A witness being examined out of court by the defendant, a judge in the case in which the depositions were to be used, refused to answer any questions. The judge, on the ground that by the code he was not acting in a judicial capacity in taking the deposition, refused to commit for the contempt as not having jurisdiction. The plaintiff asked for a mandamus to compel him to act. *Held*, he had jurisdiction and mandamus was the proper remedy to protect the plaintiff's rights. *Crocker et al.* v. *Conray* (Cal. 1903) 73 Pac. 1006.

Assuming that the court was right in holding that the defendant had jurisdiction to commit for contempt, the importance of the distinction between civil and criminal contempts is emphasized. In 2 COLUMBIA LAW REVIEW 45 it was pointed out that the pardoning power of the president should extend to criminal but not to civil contempts, and in 2 COLUMBIA LAW REVIEW 348 that a contemnor should be allowed to purge by oath a criminal but not a civil contempt, the reason for the distinction being that the civil contempt process is availed of to protect a suitor's rights. It would follow then that where the guilt is admitted, though it would be discretionary with the judge to commit for a criminal contempt, it would be obligatory in the civil case. As, therefore, in the principal case, the witness was admitted guilty of a civil contempt, the plaintiff could insist on the defendant exercising the jurisdiction which the upper court decided that he had. The remedy by mandamus was proper, for though an inferior court cannot by mandamus be directed how to act, *Judges O. C. P.* v. *People* (1837) 18 Wend. 79; ex parte *Burtis* (1880) 103 U. S. 238, it can be compelled to act, where it refuses to exercise its proper jurisdiction. *State* v. *Laughlin* (1882) 75 Mo. 358.

PLEADING AND PRACTICE—COUNTY COURT JURISDICTION. The plaintiff brought an action in the County Court demanding judgment for $900 to which the defendant interposed a counterclaim asking damages in the sum of $30,000. The plaintiff demurred on the ground that the County Court had no jurisdiction over the counterclaim. *Held*, the demurrer should be overruled. *Howard Iron Works* v. *Buffalo Elevating Co.* (1903) 176 N. Y. 1.

The case presents a difficult question of construction. Art. VI, § 14, New York Constitution limits the jurisdiction of the County Court to actions "in which the complainant demands judgment for a sum not exceeding $2000", and further provides that the legislature may not so alter the jurisdiction as "to authorize an action . . . . in which the sum demanded exceeds $2,000. § 340, New York Code, gives the County Court jurisdiction when the complaint demands a sum not exceeding $2000. § 348 provides that when the court has jurisdiction "it possesses the same jurisdiction, power and authority which the Supreme Court possesses in a like case." Construing these provisions the court maintained that the amount of the counterclaim is immaterial since the constitution and statutes quoted refer only to a complaint and taken with § 348 of the Code show that the County Court once having jurisdiction may entertain a counterclaim to any amount.

PLEADING AND PRACTICE—ORDER OF ARREST—GRANTED ON AFFIDAVITS. The original complaint averred two distinct causes of action, one in contract and one in tort for fraud. An order of arrest was granted upon affidavits supporting the allegations of fraud alone. Defendant demurred

to the complaint and an amended complaint was served and retained, alleging the cause in tort only. Upon a motion to vacate the order of arrest, *held*, the order must stand, being supported by the affidavits, without the complaint. *Lewis* v. *Pollack* (N. Y. 1903) 85 App. Div. 577.

This decision follows *Hall* v. *Conger* (N. Y. 1885) 1 How. Pr., N. S. 88, and reaches a more satisfactory result than that in *Engelhardt Co.* v. *Benjamin* (N. Y. 1896) 2 App. Div. 91, holding that a complaint was necessary to support the order under § 549, subd. 4 of the Code of Civil Procedure, providing for the order "where it is alleged in the complaint," &c., because it admits the force of the provision in § 558, which provides for vacating the order "if the complaint fails to set forth a sufficient cause of action." The two sections should not be treated as inconsistent; and so, destructive, one of the other. *New Haven Webb Co.* v. *Ferris* (1891) 125 N. Y. 364.

REAL PROPERTY—ELEVATED STATION—LIABILITY OF RAILROAD FOR DAMAGES. The defendant, in obedience to a mandatory act of the legislature, ran its trains above the street level upon a viaduct, constructed by State commissioners and built a station at a place on the viaduct specified by the legislature. The plaintiff owned property abutting on the street through which the railroad ran and sued for damages caused by the viaduct and station. *Held*, they could recover for the damage caused by the station but not for that caused by the viaduct. *Dolan* v. *N. Y. & H. R. Co.* (1903) 175 N. Y. 367.

In refusing to give relief for the damage caused by the viaduct the court followed the law of New York as settled by *Fries* v. *N. Y. & H. R. Co.* (1901) 169 N. Y. 270 and *Muhlker* v. *N. Y. & H. R. Co.* (1903) 173 N. Y. 549. 2 COLUMBIA LAW REVIEW 158; 3 COLUMBIA LAW REVIEW 347. But the court interpreted these cases strictly and, as respects the damages caused by the station, applied the anomalous doctrine of the class of cases exemplified by *Story* v. *N. Y. Elev. R. Co.* (1882) 90 N. Y. 122.

SALES—DIRECTION TO SELL AS CONSTITUTING A PRESENT SALE. The defendant sold standing trees to N., who, to secure payment to the plaintiff for sawing them, gave the plaintiff a chattel mortgage thereon, which was never recorded. The sawed lumber remaining on the defendant's land, N. directed him to sell it on account of the claim for the purchase money, but it was found to be insufficient to satisfy even this claim. *Held*, the direction to the defendant constituted a present sale, free from the plaintiff's unrecorded mortgage. *McArthur* v. *Mathis* (N. C. 1903) 45 S. E. 530.

There was nothing in the facts inconsistent with a sale, *Straus* v. *Wessel* (1876) 30 O. St. 211, and the title passed when the defendant accepted the lumber, *Jenkins* v. *Jarrett* (1874) 70 N. C. 255. Little additional evidence, however, would seem to be required to show that N. intended to appoint the defendant his agent to sell the lumber which would then be liable to the mortgage as if it remained in the hands of the principal, until the title passed to a third party.

TAXATION—INCLUDING VALUE OF NON-TAXABLE PROPERTY IN ASSESSING FRANCHISE TAX. The capital stock of the relator was invested in patent rights. In assessing the value of its franchise for taxation these were included by the comptroller. The relator appeals on the ground that patents are exempt from taxation by Federal law. *Held*, the tax was imposed not on the patent rights as property but upon the right to do business and in determining the value of the franchise, patent rights might be included in the appraisal. *People* ex rel. *The U. S. Aluminum Printing Co.* v. *Knight* (1903) 174 N. Y. 475.

The case raises a doubtful point. The court confessedly overrules its decision in *People* v. *Roberts* (1899) 159 N. Y. 70, saying that the distinction taken in the principal case was not pointed out therein. Cases were chiefly relied upon wherein in assessing a franchise tax, investments in

United States bonds, exempt from taxation, were included, and the assessment upheld on the ground that the tax was not upon property. *Bank* v. *City of Rochester* (1867) 37 N. Y. 365; *Provident Institution* v. *Massachusetts* (1867) 6 Wall 611; *Home Ins. Co.* v. *New York* (1889) 134 U. S. 594. In all these cases, however, the non-taxable property formed only a part of the corporation assets. In view of its attitude in *Steamship Co.* v. *Pennsylvania* (1886) 122 U. S. 326 a ruling by the United States Supreme Court upon the facts presented in the principal case would be of interest.

TORTS—ABUSE OF PROCESS—SUFFICIENCY OF COMPLAINT. Under an alleged criminal warrant issued in another county, the defendant arrested the plaintiff; and under threat of being taken back to that county the plaintiff paid the expense of serving the warrant and procured the release of a claim owed by one B to the plaintiff's father. *Held*, to be an abuse of legal process; and a complaint need not aver that the warrant was wrongfully and willfully used for an improper purpose if it aver facts from which such inference is fairly deducible. *Foy* v. *Barry* (1903) 84 N. Y. Supp. 335.

Where a process is willfully used to accomplish some ulterior purpose, or to force the doing of some collateral act not within its proper scope, a cause of action arises, *Antcliff* v. *June* (1890) 81 Mich. 477; *Sneeden* v. *Harris* (1891) 109 N. C. 349; *Holley* v. *Mix* (1829) 3 Wend. 350; and, unlike an action for malicious prosecution, it is not necessary to aver that the action in which the process was improperly used, has been determined, nor that it was procured without reasonable or probable cause. *Grainger* v. *Hill* (1838) 4 Bing. N. C. 212; *Dishaw* v. *Wadleigh* (N. Y. 1897) 15 App. Div. 205; *Zinn* v. *Rice* (1891) 154 Mass. 1.

TORTS—INTERFERENCE WITH BUSINESS—RIGHT OF LABOR UNION TO INJUNCTION. The plaintiffs, sued as members of an unincorporated association in behalf of themselves and all other members of the association to restrain the defendant corporation against which the union was prosecuting a strike, from interfering with and intimidating their "pickets." *Held*, the injunction must be refused. *Atkins* v. *Fletcher Co.* (N. J. 1903) 55 Atl. 1074. See NOTES, p. 59.

TORTS—SLANDER—PRIVILEGED COMMUNICATIONS. The defendant, in the presence of a third person, said to plaintiff, "you be careful how you speak or talk downtown. They say you committed perjury and I as a friend tried to stop them from prosecuting you." *Held*, since the defendant acted under the honest belief that he was performing a moral and social duty toward the plaintiff, the statement was privileged. *Hudnell* v. *Eureka Lumber Co.* (N. C. 1903) 45 S. E. 532.

The decision is unsound. Publication is the principal element of the action, and the court seems to have misinterpreted its meaning. Communication to a person other than the accused is necessary to give rise to an action of slander, *Frank* v. *Kaminsky* (1884) 109 Ill. 26; *Broderick* v. *James* (N. Y. 1871) 3 Daly 481, and to justify such communication the duty must be toward that third person. Bradley *v.* Heath (Mass. 1831) 12 Pick. 163; *Bransletter* v. *Dorrough* (1882) 81 Ind. 527; Townshend, Slander & Libel 4th ed. § 241; Cooley, Torts, 216. The defendant imputed the commission of perjury and such is slander per se. *Brown* v. *Hanson* (1875) 53 Ga. 632; *Miles* v. *Harrington* (1871) 8 Kan. 425.

WATERS—APPROPRIATION—TITLE BY PRESCRIPTION. Plaintiff, a prior appropriator of all the waters of a creek, sought to enjoin defendant from diverting the water. The defendant, among other things, pleaded a title by adverse user. *Held*, a subsequent appropriator cannot acquire such a title by adverse user unless such use deprives the prior appropriator of the water when he has actual need of it, and doubted (in a concurring opinion) whether such a water right can be obtained by adverse use at all. *Talbot* v. *Butte City Water Co.* (Mont. 1903) 73 Pac. 1111.

Without private ownership of the soil, the rights acquired by prior appropriation are as perfect and absolute as if acquired by an express grant, *Kidd* v. *Laird*, (1860) 15 Cal. 162, subject only to the trust that the water shall be employed for some useful purpose. *Lux* v. *Haggin* (1886) 69 Cal. 255, 309. In so far as the waters are not so used they are open to a second appropriation, either in whole or in part. *McKinney* v. *Smith* (1863) 21 Cal. 374. There could be no adverse possession, under those circumstances, because there is no invasion of a right for which an action would lie, *Ditch Co.* v. *Crane* (1889) 80 Cal. 181, but it may well be that a prescriptive title may arise where the needs of the prior appropriator cannot be accurately defined. *Davis* v. *Gale* (1867) 32 Cal. 27. There can be little doubt that such a water right can be obtained by adverse user. *American Co.* v. *Bradford* (1865) 27 Cal. 361.

WILLS—CONSTRUCTION—LIMITATION AFTER DEVISE IN FEE. Testator willed to his wife all his real and personal property but provided that if she died without issue and without disposing of the property by will, the same should descend to a designated person and his heirs, *Held*, the wife took a fee and the limitation over was repugnant to the gift to her and void. *Channell* v. *Aldinger* (Iowa 1903) 96 N. W. 781.

The limitation over after the devise to the wife could not take effect as a remainder since the devise to the wife was a fee. It was void as an executory devise inasmuch as it is essential to the validity of an executory devise that it cannot be defeated by any act of the first taker, while in the principal case since the wife had been given power of disposition by will the limitation over could be defeated. Numerous decisions support this rule. *Att. Gen.* v. *Hall* (1731) Fitzg. 314; *Wolfer* v. *Hemmer* (1893) 144 Ill. 554; *Fisher* v. *Wister* (1893) 154 Pa. St. 65. The early New York cases followed the rule. *Jackson* v. *Bull* (1813) 10 Johns. 19; *Jackson* v. *Robins* (1819) 16 Johns. 537. But today the limitation over would be good in New York, and it was so held in *Leggett* v. *Firth* (1892) 132 N. Y. 7, under § 47 of the Real Property Law which provides that "an expectant estate may be defeated in any manner, or by any act or means which the party creating such estate, in the creation thereof has provided or authorized. An expectant estate thus liable to be defeated shall not, on that ground, be adjudged void in its creation."